80-955

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IN THE

Supreme Court of the United States

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

MICHAEL R. WENGER, Commissioner
West Virginia Department of Employment
Security, J. F. McCLANAHAN, CLARENCE
ELMORE, and JOHN T. POFFENBARGER,
Members of the Board of Review,
Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Respondent, Michael R. Wenger, Commissioner, West Virginia Department of Employment Security, J. F. McClanahan, Clarence Elmore, and John T. Poffenbarger, Members of the Board of Review, respectfully pray that the Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 15, 1980 be denied.

COUNTER STATEMENT OF THE QUESTION

Whether the District Court was correct in ruling that the W. Va. Code §21A-6-3(4), which Section provides that individuals are entitled to unemployment compensation benefits while on strike if they fall under the exceptions contained therein, is not unconstitutional under the doctrine of federal preemption because its purpose is to provide for the payment of benefits and not the regulation of collective bargaining.

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CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary nothwithstanding.

STATUTES INVOLVED

Section 21A-6-3(4) of the Unemployment Compensation Law of the State of West Virginia, W. Va. Code §21A-6-3(4) (1978), provides for the payment of unemployment compensation benefits to striking employees after a state unemployment compensation Appeals Tribunal, the West Virginia Unemployment Compensation Board of Review, or a reviewing state court determines that an employer has denied employees the right of collective bargaining under generally prevailing conditions:

§21A-6-3. Disqualification For Benefits.

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits:

> (4) For a week in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he was last employed, unless the commissioner is satisfied that he was not (one) participating, financing, or directly interested in such dispute, and (two) did not belong to a grade or class of workers who were participat-

ing, financing, or directly interested in the labor dispute which resulted in the stoppage of work. No disqualification under this subdivision shall be imposed if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or *if employees are denied the right of collective bargaining under generally prevailing conditions,* or if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions. (Emphasis Supplied)

STATEMENT OF THE CASE

The procedural history of this case as set forth in the Petition filed on behalf of Westinghouse is essentially correct. The real parties in interest in this case, viz., The International Union of Electrical, Radio and Machine Workers, members represented by Westinghouse at its Fairmont, West Virginia plant were not made parties because of the nature of this litigation; that is, this action was brought to enjoin the State from holding a hearing in the first instance and to further declare the State law unconstitutional.

The Commissioner of the West Virginia Department of Employment Security was made a defendant in this action because he is a party to all matters before the Board of Review by virtue of the West Virginia statutory provision contained in W. Va. Code §21A-7-8. The Board of Review of the West Virginia Department of Employment Security is an independent tribunal created by the West Virginia Code §21A-4-1, et seq., whose members are appointed by the Governor.

This Response is, therefore, filed on behalf of the parties who have no direct financial interest in the outcome of this litigation. The Commissioner of the Department of Employment Security submits this brief because he was sworn to uphold the laws of the State of West Virginia and he must therefore defend the constitutionality of the law which he has sworn to administer. The Board of Review appears herein since Westinghouse has sought to enjoin it from proceeding to hear this case in accordance with the procedure dictated by the W. Va. Code.[1]

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1. The procedure for hearings by an appeals tribunal is set forth in W. Va. Code 21-7-7a.

Statement of the Case

It is noteworthy that the Appeals Tribunal of the Board of Review on January 9, 1980 rendered a decision in this case denying benefits to the members of the International Union of Electrical, Radio and Machine Workers employed by Westinghouse at its Fairmont, West Virginia plant.[2] This decision was affirmed by the Board of Review on July 31, 1980.[3] Therefore, unless the Circuit Court of Kanawha County where this matter is presently pending on appeal reverses the decision of the Board of Review, the account of Westinghouse would not

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2. "It is stipulated that the claimants participated, financed and were directly interested in the labor dispute involved, and that they belonged to a class or grade of employees who were participating, financing, and/or were directly interested in the labor dispute."

The language of the above stipulation generally paraphrases the disqualifying language for benefits, as contained in Paragraph (4), Section 3, Article 6, Chapter 21A, of the West Virginia Code.

But, it is the contention of Claimants that no disqualification under the above subdivision should be imposed because of the exception to the rule that the "employees are [were] denied the right of collection bargaining under generally prevailing conditions . . ."

Whereupon, as the lengthy and complex testimony cannot in brevity be re-stated, it is ruled that the exception is here found not to prevail so as to overcome the general rule of disqualification.

The Employer's written "Motion To Correct Record" together with supportive affidavits thereto by John F. Frantz, William A. Towle and Lee D. Bellmer, are received, filed herein, and made a part of the record. Further, the Post-Hearing Brief of the Employer was timely received and is filed herein.

The claim for unemployment compensation benefits is denied. Claimants are disqualified pursuant to Paragraph (4), Section 3, Article 6, Chapter 21 of the West Virginia Code.

This, the 9th day of January, 1980." Appeals Tribunal Decision, L.D. Case No. 79-236 (Group)

3. In the matter of William R. Bennett, et al, R LD No. 80-1 (July 31, 1980).

be charged with the unemployment compensation benefits and, thus Westinghouse will have sustained no monetary loss whatsoever.

Although the defendants do not challenge the Statement of Facts in the brief filed on behalf of Westinghouse, it should be noted that the evidence in this case has been entirely developed by Westinghouse based upon its pleadings, affidavits filed, and argument of counsel. No answer has been filed in this case nor has there been any evidentiary hearing on the merits of the injunctive relief sought.

REASONS FOR DENYING THE WRIT

1. The District Court Was Correct In Holding That The Federal Labor Law Preemption Doctrine Has No Application To The Right Of The States To Determine Whether Striking Employees Are Entitled To Unemployment Compensation Benefits Under State Law.

W. Va. Code §21A-6-3(4) which provides for the payment of benefits upon determination that the employer has denied its employees "the right of collective bargaining under generally prevailing conditions", is not preempted by the National Labor Relations Act and is not unconstitutional.

W. Va. Code §21A-6-3(4) was enacted as part of the unemployment compensation program, which program was enacted in 1936, to take advantage of the provisions of Title IX of the Social Security Act and is thus part of a federal-state program which is not subject to the doctrine of federal preemption. The decision of the United States Supreme Court in a recent case of *New York Telephone Company* vs. *New York Department of Labor*, 440 U.S.

519 (1979) held that although the unemployment compensation statutes of the several states conflict with federal labor policy, the legislative history of the National Labor Relations Act and the Social Security Act indicate that Congress was aware of and had decided to tolerate this conflict. Further, if Congress had intended to prohibit the states from paying unemployment compensation benefits to individuals on strike, it could have done so and not left this vital decision to the various state legislatures.

The general purpose of the West Virginia Unemployment Compensation law is not to regulate the bargaining relationship between labor and management but to provide a means of employment security in the State. A determination by the State with respect to whether or not it will pay benefits in a given situation does not infringe upon the right of National Labor Relations Act.

Generally, in West Virginia the law provides that when individuals go on strike, they are disqualified from receiving unemployment compensation benefits.[4] However, the West Virginia law contains several exceptions to the foregoing rule and the exception challenged herein provides that striking employees are not disqualified from benefits if they have been denied "the right of collective bargaining under generally prevailing conditions".

Labor law preemption is a doctrine designed to give effect to the supremacy clause, U. S. Constitution Article VI, which declares that the Constitution, laws and treaties of the United States "shall be the supreme law of the land". As such, application of the doctrine in the end depends upon the intent of Congress. Certainly when

4. W. Va. Code §21A-6-3(4)

enacting a law, Congress indicates that it sees no conflict between that law and state legislation or that it is willing, for whatever reasons, to tolerate any possible conflict, it cannot be said that the "supremacy" of federal laws is threatened by particular state action. The doctrine of labor law preemption invoked by the employer—a claim that the NLRA supercedes and invalidates the West Virginia legislation—is implied[5] from the federal labor laws. See *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 285-7 (1971); *New York Telephone*, 59 L.Ed.2d at 569, 99 S.Ct. at 1341. It is, consequently, entirely a creature of legislative history.[6].

Contrary to the assertion of Westinghouse's Petition, the West Virginia statutory provision, which sometimes permits the payment of unemployment compensation benefits to striking employees, neither frustrates the operation of the federal program nor creates a substantial risk of conflict with the policies of the Federal Labor law. This law was enacted for the sole purpose of permitting the payment of benefits, whereas, the National Labor Relations Act as designed to regulate collective bargaining. While Congress desired uniform application of labor-management relations under the National Labor Relations Act, it did not have the same view with respect

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5. The Court noted repeatedly through the *N. Y. Telephone* decision that the doctrine of preemption sought to be applied is *implied* from the NLRA. The Employer's authorities do not even suggest any application of any *express* preemption in the present case. Note the repeated references to the concept of "implied preemption" is throughout the opinion at 59 L.Ed.2d at 557, 561, 564, 570-71, 99 S.Ct. at 1331, 1334, 1337, 1342-3 and the statement of the Court that "much of the doctrine is of limited relevance in the present context . . ." 59 L.Ed.2d at 561, 99 S.Ct. at 1334.

6. The Employer does not, and could not, contend that any doctrine or express preemption is involved in this case.

to the unemployment compensation laws which emanated as a concomitant of the Social Security Act.

Westinghouse's petition cites in support of its pre-emption argument the decision of the Supreme Court in the case of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). *Garmon* is not applicable to the situation presented herein because this decision did not involve State unemployment compensation laws but rather matters clearly within the purview of the National Labor Relations Act. Moreover, *Garmon* was decided in 1959, over twenty (20) years ago, and involved the issue of whether the California Court could rule on an issue involving peaceful picketing by unions who had not been certified as bargaining agents by the employer. Therefore, this case clearly involved an issue addressed by the National Labor Relations Act which could be resolved by the National Labor Relations Board and is clearly distinguishable from the issue presented herein involving the payment of unemployment compensation benefits to striking employees. Furthermore, in *Garmon* the Court was required to make a determination involving priority of a state law and a federal law whereas, here we have a direct confrontation between two federal laws.

The Petition filed on behalf of Westinghouse states that the State of West Virginia will make an award of one and one-half million dollars against Westinghouse, which statement is misleading for two reasons. First, the action pending in state court must be reversed because, if affirmed, Westinghouse's account will not be charged under West Virginia law.[7] Moreover, even if the Circuit

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7. W. Va. Code 21A-7-11 provides: "Benefits found payable by decision of a deputy, appeal tribunal, the board or court shall be immediately paid in accordance therewith up to

(Footnote continued on next page)

Court reverses, Westinghouse will not have to actually pay any of this amount. The only impact of such a decision will be the effect on Westinghouse's merit rate account at some future date. Currently, and in the foreseeable future, there will be no financial impact on Westinghouse since all West Virginia employers are required to pay the same rate because of insolvency of the Unemployment Compensation Trust Fund.

In recognition of the strength of the Supreme Court ruling in *New York Telephone*, counsel for Westinghouse attempts to distinguish that decision from the case at bar. The background for the strike involved in *New York Telephone* and the background involved in the strike herein have similarities.[8]

(Footnote continued)
the week in which a subsequent appellate body renders a decision, by order, finding that benefits were not or are not payable. If, at any appeal stage, benefits are found to be payable which were found before such appeal stage to be not payable, the commissioner shall immediately reinstate the payment benefits. If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner shall recover such amount by civil action or in any manner provided in this Code for the collection of past-due payment and shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit such amount against the overpayment until it is repaid in full. If the final decision in any case determines that the claimant was not lawfully entitled to the benefits paid to him pursuant to a prior order, any benefits so paid pursuant to such prior order, shall not be chargeable to the employer's account."

8. The goal of the New York strike was to disassociate the New York units of the CWA from the nationally settled upon contract and to dislodge petitioners from the "pattern" bargaining format long used by Bell affiliates. Under that format, management and International CWA officials would select two Bell affiliates with early contract expiration dates and would attempt to reach a settlement at both, which would then be

(Footnote continued on next page)

Reasons for Denying the Writ

There is no real distinction between the New York Unemployment Compensation law considered in *New York Telephone* and the West Virginia Unemployment Compensation law considered herein since both of these statutes achieve the same end result, that is, the payment of benefits to individuals on strike in certain instances, which payments admittedly has the effect of altering the balance of economic power in collective bargaining, which is the real complaint of the plaintiff.

The District Court in *New York Telephone* held that the payment of benefits to striking employees conflicted with the policy of free collective bargaining established in the federal labor laws and was therefore, invalid under the supremacy clause of the Constitution. This decision was reversed by the Second Circuit but not on the basis of the District Court finding. The reversal was on the theory that since Congress had not expressly forbidden unemployment compensation benefits for strikers, this was a conflict which Congress decided to tolerate.

(Footnote continued)
used as the basis for the contracts at all Bell units around the country. In order to "break the pattern", the New York CWA units refused to ratify the pattern agreed upon by the International CWA and the pattern-setting affiliates during the week-long national strike in July, 1971, and most members of the New York units remained on strike. Although the International originally opposed the continuation of the strike, it eventually lent its support. The strike was settled when petitioners agreed to a modest, but precedentially significant increase in wage benefits over the national pattern. 434 F.Supp. 810, 812-14 and n. 3 (SDNY 1977).

In this case the union representatives, Messrs. Vingle and Shaffer testified that Westinghouse had, in their view, bargained in bad faith during 1979 national negotiations by refusing to provide certain information to the IUE, by delaying its contract proposals until July 9, 1979, by insisting on "take-away" proposals and by requesting that Westinghouse's Charlotte, North Carolina plant not be included in the national collective bargaining agreement.

In March of 1979, this Court affirmed the Court of Appeals and ruled that the New York Unemployment Compensation law which permits the payment of benefits to strikers after the expiration of eight (8) weeks, was not subject to the doctrine of federal preemption. In addressing this issue, this Court examined the reasons underlying the doctrine of labor law preemption and recognized a national uniformity in the regulation of collective bargaining. In *New York Telephone*, it was found necessary to distinguish two (2) cases which had held that Congress intended to forbid State regulation of economic warfare between labor and management.[9]

In *New York Telephone*, this Court decided that unemployment compensation cases were distinguishable from the main body of labor preemption cases:

> ". . . the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public . . . the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of insuring employment security in the State . . ."

In Part III of the Opinion after detailing the history of Title IX of the Social Security Act and the National Labor Relations Act and noting that these two (2) statutes were considered in Congress at the same time and were enacted within five (5) weeks of one another, the Court concluded that Congress was aware of the

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9. See *Teamsters* v. *Morton*, 377 U.S. 252; *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and discussion in *New York Telephone*, 440 U.S. pp. 530-533

impact of unemployment benefits on the bargaining process.

> "Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments."

That finding set the stage for the preemption ruling:

> "In all events, a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress . . . In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power . . ." 440 U.S. at 545, 546.

From the foregoing, it is clear that the primary concern of the Court was the effect of unemployment compensation benefits on the outcome of a labor dispute.

Therefore, State-federal unemployment programs—whether enacted by West Virginia, New York or any other state—are simply not subject to preemption notwithstanding the fact of employer charges that payment of benefits to strikers alters the labor-management balance.

The differences between the West Virginia and the New York statutes are encompassed within the broad

discretion granted to the states and the substantial diversity of the state programs contemplated by Congress in 1935. Under the New York program, all employees are entitled to benefits after eight (8) weeks, whereas, under the West Virginia scheme, individuals on strike are only entitled to benefits if they are being denied the "right of collective bargaining under generally prevailing conditions." The Petition filed on behalf of Westinghouse contends that the West Virginia law serves to regulate the actions of the employer in collective bargaining. This argument is founded upon the theory that the West Virginia provision amounts to some sort of labor-management regulatory program. The West Virginia statute, as well as the New York law, were enacted for the sole purpose of promoting economic security of unemployed individuals within the respective states.

Therefore, much like the New York statute, "the general purpose of the program is . . . [to] provide an efficient means of insuring employment security in the State." *New York Telephone,* 440 U.S. at 533.

The West Virginia program, like the New York program, is funded with public funds.[10]

> "As this court held in a related context, such unemployment benefits are not a form of direct compensation paid to strikers by their employer; they are disbursed from public funds to effectuate public purpose." 440 U.S. at 534.

Even though the New York statute makes the struck employer rather than all employers "primarily responsi-

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10. The funding provisions of the West Virginia statute, 21A-5-4 et seq., W.Va.C., are similar to the New York provisions discussed in *New York Telephone,* 440 U.S. at 524 and 525.

ble for financing striker benefits, the employer-provided monies are nonetheless funnelled through a public agency, mingled with other—and clearly public—funds, and imbued with a public purpose".

The West Virginia program, just like the New York program:

> ". . . differs from State statute expressly regulating labor-management relations for another reason. The program is structured to comply with the federal statute, and as the consequences financed, in part with federal funds . . . More importantly, as the Court has pointed out in the past the federal statute authorizing the subsidy provides *additional evidence of Congress' reluctance to limit the States' authority in this area.* 440 U.S. at 536. (Emphasis supplied)

The West Virginia Unemployment Compensation law was initially enacted by the legislature in 1936, to benefit from Title IX of the Social Security Act of 1935. The gross similarities of the West Virginia and New York programs—including the circumstances that both were enacted to compliment and benefit from the 1935 Social Security Act, the method of financing and providing benefits and the eligibility criteria—all document the likeness of the West Virginia program to the New York program and, consequently, the applicability of *New York Telephone.*

Counsel for Westinghouse relies upon footnote 15 in *New York Telephone* as strongly supporting his position that the main body of labor law preemption has application to State Unemployment Compensation programs. In this connection, it is submitted that this Court properly rejected the claim that the National Labor Relations Act forbids states from awarding unemployment compen-

sation benefits to participants in illegal strikes. It follows that this same reasoning should prevail here where the employer is claiming that the National Labor Relations Act forbids states from awarding unemployment compensation benefits to participants in strikes where the employer refused to bargain in good faith.

The contention in Petitioner's argument that the holding of the Fourth Circuit permits the State of West Virginia to rule upon the legality of the strike is not justified. An examination of the record indicates that at no time does the issue of legality of the strike ever appear in this case.

Counsel for Westinghouse relies upon the case of *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), which case involved the reverse of the states position which is presented herein. In *Nash*, Florida denied unemployment compensation benefits because the claimant filed unfair labor practice charges under the National Labor Relations Act. This decision stands for the proposition that the right of benefits under state law should not be affected by proceedings pending before the National Labor Relations Board which is precisely the position taken by the State in this proceeding. That is, the right to unemployment compensation benefits under State law is not affected by the National Labor Relations Act. If the National Labor Relations Board makes a different determination under the same set of facts, they would not affect the validity of the State decision.

In concluding its preemption argument, Petitioner again asserts that the West Virginia statutory provision, Section 21A-6-3(4), under consideration herein, regulated the bargaining relationship between Westinghouse

and IUE. Again, it is submitted that an examination of the bargaining conduct by a hearing tirbunal in order to determine the right to unemployment benefits does not *per se* amount to regulation. The Petition alleges that the charge of one and one-half million dollars in unemployment benefits against Westinghouse is regulatory of its conduct. It is urged that if the award of benefits is the thrust of the regulation, then what is the distinction between the case now before the Court and *New York Telephone*. In *New York Telephone* the right of striking employees to receive benefits was upheld by this Court.

In sum, it is submitted that the District Court and the Fourth Circuit properly applied the rationale of *New York Telephone*.

2. The Fourth Circuit Correctly Decided The Issue Of Labor Law Preemption.

In this section of his argument, counsel for the Petitioner expresses his concerns with respect to the far-reaching effect of the decision of the Fourth Circuit. He maintains that there should be a uniform interpretation of the NLRA as it relates to collective bargaining. Again, it is submitted that the authorities cited to support this contention were distinguished in *New York Telephone*.

Petitioner further asserts that if the decision of the Fourth Circuit stands, the states will have an unlimited right to regulate collective bargaining through the unemployment compensation system, thus subjecting employers to conflicting regulation of collective bargaining. To the contrary, even if Court of Appeals decision amounts to regulation by the states which it does not, the decision will have little impact except in West Vir-

ginia. West Virginia is one of two states that contain an exception to the labor dispute disqualification if employees are denied the right of collective bargaining. Petitioner in support of its assertion of far-reaching effect, can find only six states (West Virginia and Utah included) which will be affected by this decision.

Petitioner complains that the Fourth Circuit's decision will subject it to divergent regulation of collective bargaining from state to state. This is true with respect to any issue wherein the states are permitted to enact their own programs. There are countless areas where regulations differ significantly from state to state not only in unemployment compensation but other areas as well. If we accept the ruling of *New York Telephone* that the issue of whether or not striking employees are entitled to unemployment benefits was left to the various states, then we must accept the result of divergent regulation by the states.

Finally, Petitioner alleges that the *New York Telephone* decision does not control this case because of the difference between the New York statute and the West Virginia statute. In this connection, the reasoning of Judge Haden in the District Court opinion best expresses Respondent's position.

> "Counsel for the Plaintiff contends that the statute involved in the *New York Telephone* case was a "neutral statute", while the West Virginia statute impermissibly intrudes into the preempted area of labor management relations and thus violates the Supremacy Clause of the United States Constitution. This Court has concluded that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment com-

pensation act, the whole import of those determinations was to determine the eligibility of strikers for unemployment benefits. Notwithstanding the characterization of the determinations made by state officials, the result is merely the granting or denial of unemployment benefits under state law and, as such, falls within an area that is not preempted by federal labor law but it rather is left to the province of the states under the *New York Telephone* case."

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should not issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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